

***Comments Of Goodin, MacBride, Squeri & Day
On Actions The Commission Can Take To Resolve Formal Proceedings More
Quickly And Efficiently***

May 6, 2019

On April 4, 2019, Administrative Law Judge Hallie Yacknin advised interested stakeholders that:

“Commissioners Rechtschaffen and Randolph invite comments on actions the California Public Utilities Commission (CPUC) can take to resolve formal proceedings more quickly and efficiently, consistent with due process and providing parties with meaningful opportunities to participate.”

Goodin, MacBride, Squeri & Day (“GMSD”) is pleased to submit its brief comments which are loosely organized largely by reference to ideas presented at the March 27, 2019 meeting of the Policy and Governance Committee.

Adjudicatory Proceedings.

Citation Programs:

On, March 7, 2019, GMSD submitted comments on proposed revisions to the rules adopted Res. ALJ-299. Subsequent to that date, the firm undertook representation of a client on *in pro bono publico* in an adjudicatory matter in which the lawfulness of those rules is at issue. Accordingly, we are unable to submit further comments with regard to the citations programs here.

Complaints

During 2016-2018, twenty percent (20%) of the dockets initiated at the Commission were complaint proceedings. (Of those, roughly half were filed under the Expedited Complaint Procedure (“ECP”).)¹ By statute, formal complaints, like other adjudicatory proceedings “shall be resolved within 12 months of initiation.”²

¹ Section 1702.1 of the Public Utilities Code. All statutory references herein are to the California Public Utilities Code unless otherwise indicated.

² Section 1701.2(i) .

The overwhelming majority of complaints are ultimately dismissed. Accordingly, the Commission should endeavor to expeditiously reach an outcome in complaint proceedings since dismissal by the Commission may reflect only the incorrect selection of a forum rather than the merits of the underlying claim. If the Commission is the wrong forum, the Complainant should not be foreclosed from choosing another simply because of the passage of time.³

Our brief comments with regard to the Commission's complaint procedure follow:

Service of Complaints:

A significant portion of the delay associated with a complaint proceeding is the period of time between the date the Complaint is filed at the Commission and the date the Answer is filed. Most of that delay is created by the fact that the Complaint is not served on the Defendant by the Complainant; instead, the Complaint is served by the Commission's Docket Office pursuant to Rule 4.3. The Answer is normally not due until thirty days after that date. The delay between the submission of the Complaint to the Commission and its actual service on the Defendant (pursuant to Rule 4.3) is customarily two to three weeks but can extend to ten or eleven weeks.⁴ Accordingly the Answer may be filed as late as three months after the date the Complaint is submitted to the Docket Office for filing.

While verified and subject to certain requirements,⁵ an Answer is rarely a document of much consequence in a complaint proceeding. While it might include jurisdictional or other defenses⁶, those typically are briefed more fully in a separate pleading. Accordingly, the Commission should consider modifying its procedures to move complaint proceedings forward shortly after the complaint is filed rather than delaying the matter unnecessarily to wait for the date an Answer is filed under current procedures.

One of two approaches could reduce this delay.

³ One might suggest that the Complainant could bring actions both at the Commission and in Superior Court. Such a course could well implicate the proscriptions of Section 1759.

⁴ One might argue that the twelve months does not commence until the date the Complainant is docketed but that approach is of little solace to the Complainant (who may have already served the Defendant by mail or email.)

⁵ Rule 4.4.

⁶ *Id.*

First, the Commission could adopt the procedure employed in courts. The Complainant, rather than the Commission, would be responsible for serving the Complaint. The Answer would be due 30 days after the service date shown in the certificate of service with five days added where service is by mail. Any disputes over service raised by the defendant may be resolved by the Presiding Officer.

Second, the Commission could offer the service arrangement described above as an option to Complainants (and possibly exclude complaints against Class C and D water and sewer companies.)

During the thirty day period, the ALJ Division could undertake its customary review of the Complaint and the process of categorizing and assigning it. If there is some reason why the defendant should not file an Answer within 30 days, the Docket Office could simply notify the parties.⁷

One final option is to adopt one of the courses described above on a trial basis.

Expedited Complaint Procedure:

Complainants meeting the requirements of Section 1702.1⁸ should be strongly encouraged to proceed under its terms. That said, we question whether a complainant may be required to do so. While Rule 4.6 suggests that such is the case, no provision in either Section 1702 or 1702.1 requires a complainant with a

⁷ Like the due date for a protest to an application, the due date for an answer to a complaint is entirely up to the Commission.

⁸ Section 1702.1 provides that:

(a) The commission shall entertain complaints against any electrical, gas, water, heat, or telephone company under Sections 734, 735, and 736 when the amount of money claimed does not exceed the jurisdictional limit of the small claims court as set forth in subdivision (a) of Section 116.220 or Section 116.221 of the Code of Civil Procedure. However, when the public interest so requires, the commission or presiding officer may, at any time prior to the filing of a decision, terminate the expedited complaint procedure and recalendar the matter for hearing under the commission's regular procedure.

(b) No attorney at law shall represent any party other than himself or herself under the expedited complaint procedure.

(c) No pleading other than the complaint and answer is necessary. A hearing without a reporter shall be held within 30 days after the answer is filed.

(d) The parties may file applications for rehearing pursuant to Section 1731. If the commission grants an application for rehearing, the rehearing shall be conducted under the commission's regular hearing procedure.

small reparations claim to seek recovery under Section 1702.1. The Commission's website states that:

In filing your formal complaint, you may request that your complaint be handled under the CPUC's regular formal complaint procedure. If you do not indicate which procedure you prefer (and if the amount is less than \$10,000 in a complaint filed by a natural person or \$5,000 in a complaint filed by a corporation or other group), the Docket Office will generally consider it as an expedited complaint.

Enforcement Actions Through Orders Instituting Investigation ("OII"s)

GMSD concurs that suggesting a proposed penalty (or reasonably narrow range of penalties) in the OII would make sense but only if some basis for that estimate is also provided in the OII.

GMSD also concurs with the proposal that the parties be required to participate in an early settlement conference. Indeed, the Commission should consider whether to require the parties to meet with an ADR neutral early in the proceeding. While such a proposal would place new burdens on the resources of the ALJ Division, more frequent and earlier settlements are in the best interest of the stakeholders and the Commission. (The Commission should also prioritize review and approval of all-party settlements in adjudicatory matters.)

All Proceedings

Expediting Resolution of Proceedings:

Each year 200-250 dockets are opened at the Commission. GMSD doubts that the Commission's resources will permit it to adopt an "expedited" procedure for all matters. Of necessity, such a procedure will need to be reserved for matters involving true statutory mandates⁹, pressing safety or operational issues, or the need to provide greater financial certainty to particular regulated entities.

In matters where an expedited schedule is required, it should be announced at the PHC. The parties should be advised at that time that barring a sound argument for modification of the schedule, the parties should expect to see it in the Scoping Memo. Given the increase in statutorily based delays (arising out new legislation), a four month schedule in an uncontested matter and a nine month schedule in a contested matter are reasonable for "expedited" proceedings.

⁹ Deadlines not subject to extension orders

GMSD agrees that telephonic PHCs are appropriate for uncontested matters and notes that many ALJ have developed a remarkable facility for conducting such proceedings in a manner that permits several PHCs in a single morning or afternoon.

GMSD strongly concurs that setting a tentative PHC date during the protest period makes sense. The PHC could initially be set to take place at the Commission courtroom but converted to a telephonic PHC if no protest is filed.

Simplify Proceedings by Amending the Rules of Practice and Procedure

The Commission's resources are limited. Its Docket Office is burdened with complex filings. Hearing rooms and reports must be carefully allocated. Simplifying the nature of the initial filing could reduce its demand on Commission resources

The complexity of certain filings is (1) not required by the Public Utilities Code and (2) inappropriate in the competitive environment within which many common carriers and other public utilities (particularly telecommunications carriers) operate. Below are two examples.

Passenger Stage Carriers

Section 1032 only requires that an application for a Passenger Stage Carrier ("PSC") CPCN include (1) a showing that the applicant is financially and organizationally capable of conducting an operation that complies with the rules and regulations of the Department of the California Highway Patrol governing highway safety (2) evidence that the applicant has filed with the Commission a certificate of workers' compensation insurance coverage or statement required by Section 460.7 and (3) an address of an office or terminal where documents supporting the factual matters specified in the showings required by this subdivision may be inspected by the commission and the Department of the California Highway Patrol.

The balance of the requirements in Section 1032 may be established through "a certification by the commission that an applicant has filed with it a sworn declaration of ability to comply and intent to comply."

The maps, schedules, detailed fares, and identification of “existing competitors” in the current rules¹⁰ seem unnecessary. The Commission should consider amending Rule 3.3 so that it only requires the information required by section 1032. As it does so, the Commission should bear in mind that Section 1032 requires that “(e)very applicant for a certificate or transfer of a certificate shall file in the office of the commission an application therefor in the form required by the commission.” Is there any real reason that the “form” of a PSC application must be a formal pleading? The Commission may be vested with the same flexibility in terms of the “form of application” for PSCs as it is with respect to developing the “rules it considers reasonable and proper for each class of public utility providing for the nature of the showing required to be made in support of proposed rate changes,”¹¹

Acquisitions of Control of a Public Utility/Sales or Encumbrances of Utility Property

Pursuant to Section 851, a public utility [a seller] may not “sell, lease, assign, mortgage, or otherwise dispose of, or encumber” public utility property without Commission approval. By contrast Section 854(a) requires that an entity seeking to acquire control¹² of a public utility [a buyer] seek prior authority from the Commission.¹³ The process of seeking authority under either statute would be simplified if the Rules governing each were distinct.

Textually, the sole obligation under Section 854 is on the buyer, the entity seeking to acquire control. By contrast, textually, the sole obligation under Section 851 is on the public utility seller.

The Commission should consider whether its Rules recognize this distinction. Rule 3.6 applies to “Transfers and Acquisitions”, apparently reaching both types of transactions. Somewhat inexplicably, it requires that the application “be signed by all parties to the proposed transaction...”, indicating, apparently, that “all parties to the proposed transaction” are applicants even though neither Section 851 nor Section 854 require such an outcome.¹⁴ Rule 3.6 may provide the motivation for the very common practice of seeking authority under the catch-all designation “Sections 851-854” even though the transaction at issue is, almost

¹⁰ Rule 3.3.

¹¹ Section 454(c).

¹² Notwithstanding the common use of the term “transfer of control”, the Public Utilities Code is devoid of any reference to a “transfer of control”.

¹⁴ These comments do not address Section 852.

invariably, only governed by Section 851 or Section 854.¹⁵ (Sometime this course is followed out of mistaken belief that an acquisition of control (Section 854), results in a transfer of the property of the acquired utility; it does not.)¹⁶

Today, an application for authority to sell or encumber property governed by Section 851 must include a description of the “character of business performed and the territory served by each applicant”¹⁷; yet the buyer or lender (1) bears no obligation to seek prior approval under Section 851 and (2) may not itself be a public utility or engaged in any activity remotely subject to regulation by the Commission. Similarly, Rule 3.6 (e) suggests that such a buyer or lender must submit certain of its financial information to the Commission.¹⁸

The Commission should consider modifying Rule 3.6 (or creating two separate rules) so that (1) the only applicant is the entity obligated to file under the applicable statute and (2) the only information required regarding a party to the transaction is with respect to that applicant.¹⁹

The Commission should also clarify which entity is the applicant in a proceeding governed by Section 854(a). Is it the ultimate parent corporation acquiring indirect control of a public utility? Or, is it also every intermediate entity in the chain of ownership, each of whom would thereby be required to submit a financial statement under Rules 2.3 and 3.6 (e)?

We hasten to add that developing such Rules would not be a simple process. Our goal here is to suggest approaches, not to present final solutions. Modifications to the Rules governing applications under Sections, 851 and 854 are best addressed in a small working group such as that formed in 2009 (chaired by Judge Yacknin) to consider changes to the entire Rules of Practice and Procedure.

¹⁵ In very rare instances, a transaction could require authority under both statutes but is hard to think why the parties would enter into such a transaction.

¹⁶ See. D13-03-007, p.6: A public utility acquired by a third party retains title to its assets (notwithstanding the transfer) until it sells those assets. The acquisition is subject to Section 854 . Section 851 is not implicated.

¹⁷ Rule 3.6(a).

¹⁸ Submitting financial information frequently results in Motions for authority to file such information under seal. While such requests are routinely granted(See *Application of SuperShuttle International, et al.*, D.06-10-037 at mimeo p. 5), Commission resources are required to process the motion.

¹⁹The Commission would, of course seek information requiring the transaction itself. In a practical sense, however, what is the point obtaining detailed financial information regarding a non-public utility buyer of property.

Reduce the Number of Formal Dockets By Exercising Authority Under Sections 829 and 853

The Commission's limited resources could be more easily allocated to expediting Commission proceedings if there were fewer formal proceedings filed each year. In order to reduce the number of new dockets, the Commission should consider exercising its authority under Sections 829 and 853 to create new limited class exceptions to Sections 816-830 and 851-854.

Long ago, the Commission created limited class exceptions for PSCs²⁰ and non-dominant telecommunications carriers.²¹ Some of the orders exempted the entities from Section 816-830 entirely (and from Section 851 to the extent an encumbrance of property was to secure debt the issuance of which no longer required advance Commission approval.) Others established procedures by which certain transactions otherwise subject to section 854(a) could receive Commission approval through an advice letter process.

Decades have passed since the Commission last created such a limited class exemption. Since the state of competition has advanced in many areas since then, it seems likely that similar treatment is appropriate for other entities subject to Commission regulation such as independent natural gas storage providers. The same consideration may apply to multi-jurisdictional utilities with only small portions of their service areas in California.

Shortening the Hearing Process

Waiving Hearings

Resources are obviously conserved if all parties waive hearings in a contested matter. If all parties stipulate to certain facts (in a jointly filed pleading), the matter can simply be briefed. Absent such a pleading, parties can submit prepared testimony that has been reformatted into declarations under oath. We agree with the suggestion that the scoping memo could set a time following the service of testimony at which the parties would have to show that reaching a decision requires hearings.

²⁰ See, Decision 98-10-031 and Resolution No. T- 18875

²¹ See, D.85-07-081, D.85-11-044, D.86-08-057, D.90-09-032 and D.96-02-072,

In a rate-setting or rule-making, the Commission exercises powers that are, from a constitutional perspective, legislative in character.²² The “process” to which a party is “due” is directed by statute.²³ The absence of a unanimous view on a factual issue need not necessarily compel a hearing if the evidence submitted by declaration provides the “substantial evidence”²⁴ statutorily required to support a finding.²⁵ In a rate-setting matter there could well be “substantial evidence” to supports quite different outcomes.²⁶ (The *Oakley*²⁷ decision, however, requires the Commission to determine whether all of the declarations could be received without cross- examination).

Motions Under Rule 11.1

A motion offers a vehicle for resolving certain matters outside the hearing room. We believe, however, that leave should be sought for authority to combine multiple requests into a single motion. (An email ruling from the ALJ would suffice.) A multi-purpose motion could delay resolution of non-controversial elements. It is not difficult to prepare and electronically file separate motions for separate requests.

Development of Templates for Scoping Memo and Proposed Decisions

The suggestions from the March meeting regarding templates for scoping memos and proposed decisions have great merit.

Indeed, very few Permit to Construct applications²⁸, telecommunications CPCN²⁹ or acquisition applications³⁰, rail crossing applications³¹ or PSC CPCN or

²² “Ratemaking is an essentially legislative act . . .” *New Orleans Public Service Inc. v. Council of New Orleans* (1989) 491 U.S. 350. See also, *Henry Wood v. Public Utilities Commission*, 4 Cal. 3d 288 (1971)

²³ Except with respect to transportation rates (Cal. Const. Art. XII, Sec. 4) , the authority exercised by the Commission is authority Article XII Section 3 of the California Constitution confers on the Legislature. The Legislature delegated its authority over public utilities (pursuant to Art. XII, Sec.3) to the Commission by enacting the Public Utilities Code. The Legislature may confer additional authority on the Commission pursuant to Article XII, Sec., 5. See, *County of Inyo v. Public Utilities Com.* (1980) 26 Cal.3d 154.

²⁴ Section 1757(a)(4).

²⁵ The “substantial evidence” standard does not apply in Rulemakings. Compare Sections 1757 and 1757.1.

²⁶ *Douglas Ames v Public Utilities Commission*, 197 Cal. App. 4th 1411; 2011 Cal. App. LEXIS 1019 (July 6, 2011)

²⁷ *Independent Energy Producers Association/Utility Reform Network (“IEP/TURN”) v. Public Utilities Commission* 223 Cal.App. 4th 945 2014 Cal.App. LEXIS 119 (February 5, 2014)

²⁸ Section 1001.

acquisition applications³²are opposed. Accordingly, there is little reason why preparation of the PD cannot begin almost immediately.

Next Steps

We appreciate the opportunity to comment. We stress, however, that the recommendations set forth above are but preliminary thoughts and impressions. We recommend that the Policy & Governance Committee pursue consideration of this subject through a working group of experienced practitioners (inside and outside the Commission), such as that the Commission convened in 2009 with respect to the Rules of Practice and Procedure.

GOODIN, MACBRIDE,
SQUERI & DAY, LLP
Thomas J. MacBride, Jr.
505 Sansome Street, Suite 900
San Francisco, California 94111
Telephone: (415) 392-7900
Facsimile: (415) 398-4321
Email: tmacbride@goodinmacbride.com

0372/001/X208009.v1

²⁹ Sections 1001, 1013.

³⁰ Applications governed by Section 854(b)-(c) should not be subject to this procedure.

³¹ Sections 1201-1202.

³² Sections 854, 1032